

appeal from Oriedo v D&R 900T
90-0067-PC-ER, 9/5/91

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 8

DANE COUNTY

MICAH A. ORIEDO, Ph.D.,

Plaintiff.

vs.

WISCONSIN PERSONNEL COMMISSION,

Defendant.

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APR 22 1992

Personnel
Commission

Case No. 91 CV 3866

DECISION AND ORDER

This is before me on respondent Wisconsin Personnel Commission's motion to dismiss the petition for judicial review in the above case number. Based upon the relevant law, the record, and the arguments of the parties. I conclude that the motion must be granted.

STANDARD OF REVIEW

The scope of judicial review of an administrative agency's decision is defined by sec. 227.57, Stats. That section provides that the court must affirm an agency's decision unless the court finds that: 1) the fairness of the proceedings or correctness of the agency's actions have been impaired by a material error in procedure, sec. 227.57(4), Stats.; 2) the agency erroneously interpreted a provision of law, sec. 227.57(5), Stats.; 3) the agency's action depends on findings of fact not supported by substantial evidence in the record, sec. 227.57(6), Stats.; or 4) the agency's exercise of discretion is outside the range delegated to it by law or is otherwise in violation of a constitutional or statutory provision, sec. 227.57(8),

Stats. The court cannot, however, substitute its judgment for that of the agency on an issue of discretion. Id.

FACTS

Mr. Oriedo filed a complaint of race and color discrimination with the Wisconsin Personnel Commission on April 26, 1990. This complaint was dismissed on September 5, 1991. On October 4, 1991, petitioner filed for a judicial review with the Circuit Court of Dane County. Petition did not serve the Commission until December 6, 1991.

DECISION

Respondent asserts that the court lacks subject matter jurisdiction and/or competency to proceed under ch. 227, Stats., because the petition for review was not served upon the parties within thirty days after the petition for judicial review was filed by the petitioner. In this regard, sec. 227.53(1)(c), Stats., provides:

A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record.

The record shows that Mr. Oriedo did not timely serve his initial petition dated October 4, 1991, upon the Commission either personally or by certified mail. Strict compliance with the service requirements of sec. 227.53(1)(c), Stats., is essential to the

circuit court's jurisdiction. Milwaukee County v. State, Labor and Industry Review Com'n, 142 Wis. 2d 504, 512 267 N.W.2d 609 (1978). Cudahy v. Department of Revenue, 66 Wis. 2d 253, 259-60, 224 N.W.2d 570 (1974).

Mr. Oriedo seeks to cure this defect by filing an amended petition. Mr. Oriedo relies upon the following provision:

The petition may be amended, by leave of court, though the time for serving the same has expired.

Wis. Stats., sec. 227.53(1)(b).

I agree with respondent that the statutory language does not give this court the authority to acquire jurisdiction of an action by amending a process in order to give it such jurisdiction. Heitz v. Johnson, 61 Wis. 2d 111, 117-18, 211 N.W.2d 834 (1973). The failure to timely serve the department with the first petition for review means that I have neither jurisdiction nor competence to act. Thus, I do not have authority to extend the time of service on the department. Cudahy, 66 Wis. 2d at 262-63. I have the power only to dismiss the action.

This case involves more than a simple error in the pleadings or the case caption. It involves the failure to serve the commission within the time adopted by law, and it goes to the trial court's jurisdiction. Gomez v. LIRC, 153 Wis. 2d 686, 691 451 N.W.2d 475 (Ct. App. 1989).


CONCLUSION

Strict compliance with the statute is necessary in this case. Accordingly, because I

have no subject matter jurisdiction, the motion to dismiss must be GRANTED. IT IS SO ORDERED.

Dated this 17th day of April, 1992.

BY THE COURT:


Susan Steingass, Judge
Circuit Court Branch 8